No. 79-395

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, *Petitioner,*

v.

HAZEL MORRISON, *Respondent.*

On A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Did the Third Circuit Court of Appeals err in dismissing the indictment with prejudice due to investigatorial and prosecutorial misconduct, which included, *inter alia,* interviewing the accused without presence of counsel, disparaging accused's counsel's competence, encouraging accused to discharge counsel and retain cooperative counsel chosen by the prosecution, threatening accused with harsher treatment at sentencing, to force her to cooperate, and thereafter manipulating the Court in order to prevent full disclosure of such misconduct? No.

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BRIEF FOR THE RESPONDENT

I. Opinion Below

The opinion of the Court of Appeals for the Third Circuit is reported at 602 F.2d 529 (1979).

II. Jurisdiction

This Court has jurisdiction under 28 U.S.C. §1254(1).

III. Counter-Statement Of The Question Presented

Did the Third Circuit Court of Appeals err in dismissing the indictment with prejudice due to in-

vestigatorial and prosecutorial misconduct, which included, *inter alia,* interviewing the accused without presence of counsel, disparaging accused's counsel's competence, encouraging accused to discharge counsel and retain cooperative counsel chosen by the prosecution, threatening accused with harsher treatment at sentencing, to force her to cooperate and thereafter manipulating the Court in order to prevent full disclosure of such misconduct? No.

IV. Counter-Statement Of The Case[1]

Respondent, Hazel Morrison, was charged with illegally distributing heroin. Before her trial she filed a Motion to Dismiss the Indictment based on a denial of her Sixth Amendment right to counsel and due process. The motion challenged the propriety of two interviews conducted by Federal Drug Enforcement Administration (DEA) agents on three consecutive days, ten days before trial. At the end of the hearing on the motion, the Respondent entered an open conditional guilty plea to one count of distribution. This, however, was contingent on appealing the denial of her aforesaid motion to the Third Circuit Court of Appeals.

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[1] There is no dispute regarding the facts of this case as contained in the Appendix filed by the Respondent in the lower court. The Court should be aware of the history of the Joint Appendix filed by the government as disclosed in correspondence to the Solicitor General, via his assistant, dated July 17, 1980, July 25, 1980 (Assistant Solicitor attempts to aver that the Clerk suggested a waiver of printing forty copies), and to the clerk of this Court dated October 1, 1980, which is incorporated herein by reference.

For her first conviction on October 10, 1978, the Respondent was sentenced to five years imprisonment with an additional special parole term of three years to follow.

The Third Circuit unanimously reversed the trial judge and dismissed the indictment with prejudice. A Petition for Reharing was denied by all the judges who participated in the decision, as well as a majority of the Circuit Judges in regular active service. One judge wrote a dissent, joined by a second. A third voted for rehearing because of the importance of the issue and a new opinion in *U.S.* v. *Broward,* 594 F.2d 345 (2d Cir. 1979), *cert. den.* _____ U.S. _____ (1979).

Dissatisfied with this sanction adjudicated by the Third Circuit for the misbehavior of government agents, the Solicitor General filed a Petition for Writ of Certiorari. The petition was granted on June 30, 1980.

The Respondent's Counter-Statement of Facts is as follows:

After the defendant was indicted, she retained private defense counsel, Salvatore J. Cucinotta, Esquire. For the purpose of pretrial negotiations and discovery, defense counsel, Salvatore J. Cucinotta, Esquire, met with Assistant United States Attorney John E. Riley and DEA agent Dennis Malloy on May 31, 1978 (A. 121a).[2]

After May 31, 1978, another DEA agent, Stephen Hopson, contacted agent Malloy for the purpose of interviewing Ms. Morrison and returning the personal property found in Respondent's automobile (A. 122a), without advising the Assistant United States Attorney or defense counsel. Agent Malloy knew that Hopson wanted "to solicit her [the accused's] cooperation in his particular investigation," and that Hopson would "negotiate" directly with the accused (Id.). To assist in his negotiations, agent Hopson discussed the pending charges "generally" with Malloy (A. 124a). He examined Malloy's file (A. 36a), which directly related to her impending September 5, 1978, trial and determined who the trial judge would be (A. 124a). Agent Hopson also spoke to Assistant United States Attorney John E. Riley, the Government's trial counsel, before negotiating with the Respondent [alone in her home] (A. 37a).

By August 11, 1978, Assistant United States Attorney G. Daniel McCarthy replaced Riley as the Government's trial counsel. On Wednesday, August 23, 1978, DEA agents Hopson and Bradley, unknown to defense counsel, went to the Respondent's home (A. 8a). Greeted by the Respondent's children, the agents obtained entry into the Respondent's home:

> BY MR. CUCINOTTA:
>
> Otis, [Morrison, Respondent's fourteen year old son] I want to direct your attention to Wednesday, August 23, 1978, the first time that you saw Agents Hopson and Bradley, and tell the good Court what you told me about what happened.

THE WITNESS:

Well, they came to my house. It was between 12 and 1 and — . . . They identified theirselves as police officers, so I went upstairs and got my mother. My brother, Michael, let them in.

My mon came downstairs and she — she — they told her that they was the — state, federal and state.

So they asked her could they sit in the dining room. They went to the dining room [A. 164a].

I went out. I went upstairs, sat on the steps, on about the fifth step, and steps is over — you could hear on the steps into the dining room and I overheard them.

They was talking and they was telling my mother . . . [A. 165a].

And one, the officer — . . . .

Well, the officer, he said that — asked my mother to help "her" out to find somebody, some person, so — and they was telling her that they could get her a new home, a job, and — and she said she didn't have nothing to say, and so he said, "Think about your kids. Who will take care of all your kids while you are doing time?"

He was telling my mother to think about the kids; and so — and he said, "We know your attorney. All he wanted was your money. He's a asshole." . . .

Her attorney, her lawyer. So they said, "If you go to court and you and your attorney will be assholes." [A. 166a].

> THE COURT: So that you understood what they said was that the only reason that Mr. Cucinotta wanted to take this to court was so that he could get money?
>
> Is that what you understood?
>
> THE WITNESS: Yes.
>
> THE COURT: All right.
>
> Go ahead.
>
> THE WITNESS: So then my mother, she didn't say nothing, only — and then they asked her —
>
> THE COURT: You are dropping your voice, Otis.
>
> Please bear this in mind. This is important.
>
> THE WITNESS: She — she said she didn't have nothing to say to them. That's what she said, so —
>
> THE COURT: All right. [A. 167a].

And,

> BY MR. MC CARTHY: [to Respondent]
>
> Q You invited them into your home.
>
> A No — they were already in my home. They were in my livingroom when I came downstairs. [A. 145a].

Agent Hopson told Respondent that he wanted to discuss the pending charges against her and how he could help her with regard to her case (A. 127a and 146a). Agent Bradley said:

> [t]here was two boundary lines that we could work in. We could recommend through the United States

> Attorney's Office [to the judge] that . . . she would get a stiff jail sentence or we could recommend . . . that the case could possibly be dismissed. . . . [A. 110a].

Finding Ms. Morrison uneffected by their overtures, the agents attempted to subvert her confidence in her lawyer and the adversary system. Hopson stated: "Your lawyer is going to make a asshole out of hisself and you, too, in the courtroom. . . . [i]f you decide to fight your case. . . ." (A. 127a. See also A. 166a, 170a and 175a). She then was questioned as to the sourse of her heroin in April and May of 1977 (A. 148a), the subject of her upcoming trial.

Resisting these inquiries, the agent reminded her that she was going to trial before the worst "son of a bitch" trial judge in the federal system (A. 128a) while the only thing her attorney was interested in was his fee (A. 128a, 166a and 167a), and not whether she would win her case (A. 176a).

Unfurling their next stratagem, the agents promised Respondent a job and another place to live if she cooperated with them (A. 175a) and not her lawyer. The agents played upon Ms. Morrison's emotional and maternal ties to her children, asking her to consider the fate of her children if she failed to cooperate and was incarcerated:

> BY MR. CUCINOTTA: [to Portia McDuffie-Respondent's seventeen year old sister]
>
> Q What did you hear?

A I heard him say — well, this the first words: I heard him say, "Well, your lawyer is an asshole," like that, "and if you cooperate with us that we could help you."

And the two — one of the — one of the officers was talking — I didn't know which one it was because I didn't see him when they came, when they arrived, when they came into the house — but one of the officers said, "If you help us then we can help you; we would give you a job and give you somewhere else, another place to live."

And she answered — she didn't say anything. It was like, you know, she ain't want to say. You know, she ain't want to cooperate.

So one of them said, "Well, think about your [A. 175a] children; think about what would happen to your kids if they didn't have a mother around the house.

And she still wasn't saying — she still wasn't giving them information that they wanted.

Q Did they use any other words to describe me?

A No.

I just remember hearing them say that you was an asshole.

Q Now, did they talk about money at all, if you recall?

A I don't recall them talking about that.

Q Did they talk about me receiving a fee?

A They said all that you wanted was the money; you wasn't really interested in whether she wins her case. [A. 172a to 176a].

Hopson then handed her a piece of paper with his phone number if she decided to change her mind and save herself (A. 129a).

> . . . [t]wo officers approached my home but I was in bed and my son answered the door, my oldest son, and he came upstairs and told me that two police officers was downstairs in my living room.
>
> I put on my robe and I came downstairs and the two officers identified theirselves as federal agents and asked me could they talk with me and I told them yes and that they could have a seat in my dining room; and we sat in the dining room and he asked me — he told me the reasons that he was at my [A. 126a] house, about my case, but he really wanted to know about an individual that he said other people have informed him that I was associated with.
>
> I told him I had nothing to say, so he told me then it was — he asked me was I represented by a public defender or private attorney.
>
> I told him I was represented by a private attorney.
>
> Then he stated, "Well, I know your attorney," and he called your name — Cucinotta.
>
> He told me if I cooperated with him he could help me, my lawyers couldn't do anything for me, and he also told me — he said, "If you decide to fight your case, your lawyer is going to make a asshole out of hisself and you, too, in the courtroom."
>
> So I asked — I told him I didn't have anything to say and he asked me did I know the judge that I was going under and I said yes.

So he said, "Well, all I want to know is, do you know the individual that I am speaking about?"

And I told him, "Yes; I do. I know a lot of people."

So he asked me — well, I think I better not say that. I don't know.

Q Do you want to spell it? [A. 127a].

A No.

He said that I was going underneath the worst SOB in the federal courtroom.

Q Well, what else did he say?

A I asked him what was a SOB. He said, "A son of a bitch."

Q Go on.

A So the other officer, Bradley, whatever his — he left my house — I mean, well, he left out of my house and went on the front porch, so Stephen Hopson wrote his name and his phone number on a piece of paper and told me — he said, "Well, if you decide to change your mind, give me a call. This is where you can reach me." The number 597-8347.

Q Did he have an opportunity to discuss the moneys that you were paying me?

A The money was — the only thing was discussed about the money was the fact that, "Your attorney, all he want was your money." No amount was made — I mean, was spoke about.

Q But what did he say about what I wanted?

A All the attorney wanted was the money that you was given but no amount; he — he made no particular amount to me that I can recall of [A. 128a].

In the presence of counsel and his investigator, Respondent called agent Hopson and tape recorded her side of the conversation,[3] stating:

> I'm calling you back because I was thinking about about what you was talking about. I want to know, what do I really have to do, since my lawyer can't help me? I mean what I'm trying to find out is, the person that you named, that's the only thing that you want me to do? Between 12:00 and 1:00 o'clock, you'll be . . . all right. Think it over [?], I did, well I thought it over when you left, when you got to talking about my kids. . . . [G-2 Trial Exhibit, A. 15a].

Plans were made to meet the agents again between 12:00 and 1:00 P.M. on the next day because Ms. Morrison wanted the investigator, Rus Kolins, retained on her behalf by counsel, "to be at my house to hear some of the things that Steve Hopson was saying to me because I felt like *my word wouldn't go far in a courtroom against an agent,* a Government agent." (Emphasis Supplied, A. 142a).

On Thursday, August 24, 1978, agents Hopson and Bradley arrived between 5:00 and 6:00 P.M. instead at the pre-arranged time (A. 140a). They were greeted by the Respondent's son, Otis Morrison, Jr.

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[3] Although the Government taped phone conversations of Ms. Morrison to prove the criminal charges, she could not tape the conversation of the DEA agents to prove their outrageous behavior without violating Pennsylvania's wiretapping law. 18 C.P.S.A. §5701 *et seq.*

Ms. Morrison's son, Otis, testified that:

> . . . [t]he next day they had come. I — I walked up on the porch and the officer asked me was my mother home.
>
> So I — I told him no.
>
> I said, "I got to go — I have to go see," because I hadn't stepped in the house yet.
>
> As I stepped in the house he tried to follow me in; so I closed the door and I told him, "I am going to see if my mother home."
>
> I went and told my mother.
>
> So while I was going to tell my mother, he was knocking on the door and he was pushing the door trying to come in, so — and I went back to the door before I got to tell my mother, and so I said, "I am going to tell my mother now."
>
> He stuck his foot in the door and tried to push the door open.
>
> He was tell me, "Let — well, let me come in until you get you mother."
>
> And so my bi[g] sister came to the door and she looked out there and who was it, see who it was, and so she ran back in and told my mom while I locked the door and that is when my mom came to the door and told him we had company.[A. 168-9a].

The Respondent told them that she wanted her attorney present (A. 158a). They left.

On Friday, August 25, 1978, the Respondent was unexpectedly visited a third time, after the agents learned

that her counsel was out of town (A. 30a). The Respondent testified on direct that:

> A Him and Agent Bradley came back to my house and they came and two — a friend of mine and my father was there. Mr. Stephen Hopson asked both of them to leave because he would like to speak with me privately.
>
> Q Did you expect him at that particular time?
>
> A Well, I got a phone call but the phone call that I received was about 9 o'clock that morning, but it was — the phone call wasn't — he didn't say his name was Stephen Hopson or he didn't say his name was Bradley.
>
> He said his name was Russ ". . . and we will be there about 10 o'clock."
>
> So I thought it was the investigator, so I made a phone call to him and he told me he had never called me.
>
> So I gathered then it could only be the other two [A. 141a Hopson and Bradley] and before I could get myself together they both was at my door.
>
> So I let them in and. . . .
>
> That was when Stephen Hopson told me that he was on investigation with another party that I was associated with again and that is when he told me that the type of deal that he could make for me.
>
> So I told him I didn't have anything to say because I was under the impression that I would talk with him *in the presence of my attorney.*

So he said, "Well, you called us and told us to come back here and *we don't need your attorney because your attorney can't do anything until you decide to agree with us,* and he said, "*the only way that the U.S. Attorney is going to hear anything that you have to say, you have to make an agreement to cooperate with us.*"

So I said, "Well, I don't have anything to say [Emphasis Supplied, A. 142a] you until I am in the presence of my attorney."

Q What did he say?

A So he said, "Well, you know, we don't — we are not — we are just wasting our time to keep coming backwards and forth out here if you are not going to cooperate." He said, "I am telling you, if you cooperate with me one hundred percent," he said, "and I will be with you one hundred percent," he said, "but if you don't cooperate with me, I will be against you one hundred percent," he said, "because I am going to bust my ass,". . . .

Q What did he say about me? [Mr. Cucinotta, Esquire]

A Well, the only thing he said about you at that particular time was the fact that he knew that who Sal Cucinotta was and that Sal Cucinotta could not present anything to the U.S. Attorney until I have made an agreement to cooperate with them.

Q Did he tell you what I was interested in again?

A I don't remember him telling me anything about interested in money again.

Q Is that the extent of the contact you had with him on Friday?

A No. Jim Bradley, that is when he said to me he could offer me two things.

I can't exactly recall what he said, but he did [A. 143a] say that he could help me in according to the two things that he was speaking about, and all he wanted to know was the fact is this where I received my heroin from, the individual's name that they spoke about, and I told him his — "I just don't have anything to say to you."

So he got a little —

Jim Bradley, well, he walked — he got up and he left.

He said — well, like he was finished with it.

So Stephen Hopson stood there and he — at my dining-room table and closed his book and he said, "You know, it is going to me your gooddamn ass that is going to jail," he says, "and I am going to bust my ass to get the other individual." He called his name.

So I told him — I said, "I still don't have anything to say because I am not in the presence of my attorney," and that is when he called it back to my attention to the judge that I was going under.

Q Go on, then.

A He said, "He hate black people."

Q Uh-huh. And then what happened?

A I told him I still don't have anything to say.

So he snatched his book up and he left.

Q What did he say he was going to do to me? [A. 144a].

A Yes. He did make a statement that I was going to wait until the last minute to cooperate with them and have you to call them and then he was going to "fango" you, whatever that means.

Q And where was your attorney that day?

A In Pittsburgh [A. 145a].

On August 30, 1978, the Respondent filed a Motion to Dismiss the Indictment with Prejudice requesting a dismissal of the charges against her on the grounds the aforesaid conduct of the DEA agents constituted an interference with her Sixth Amendment right to counsel and a denial of due process. The Government's Memorandum in response admitted "without advising defense counsel, the Government during the aforesaid week (August 23, 1978) attempted to induce the defendant to become an informant and to cooperate with the Federal Agents in their on-going investigation of traffic in narcotics" (A. 72a). However, the Government when answering said motion: (1) denied that the agents sought to learn where the Respondent's heroin supply came from in April or May of 1977 (Answer to Defendant's Motion to Dismiss the Indictment with Prejudice, paragraph #7, A. 6a); (2) indicated that the "agents specifically advised the defendant that they did *not* want to talk about her outstanding case," (Emphasis Supplied, *Id.*); and, (3) denied that the effectiveness of defendant's trial counsel was ever discussed between the agents and the Respondent. (Paragraph #9, A. 7a). Items

one through three would later be recanted by the agents, but only after they manipulated the trial court into discovering whether their conversations were tape recorded.

On August 31, 1978, Respondent entered into an agreement with the Government whereby she would waive all her pretrial motions, jury selection and trial rights and enter a plea to one count of the indictment as long as she could have a hearing on her Motion to Dismiss which could be appealed to the Third Circuit Court of Appeals if denied by the trial judge.[4]

On September 5, 1978, defense counsel and Respondent appeared in court ready for a hearing on the dismissal motion, along with a cassette tape recorder and three tapes, two of which were labeled "HOPKINS - PHONE" and "HOPKINS - AUG. 25" (sic). The tapes were placed on the defense table along with his file, folders and notes. Defense counsel expected to utilize a third tape containing the one-sided phone call of Ms. Morrison and transcription of same during the hearing on the motion (Trial Exhibit G-2, A. 15a, and Trial Exhibit G-3, a cassette tape). Noticing the labeled tapes and recorder, the Government's first witness, DEA agent Hopson, advised the Assistant United States Attorney G. Daniel McCarthy that "he believed that the tape recordings resulted from illegal wiretapping and eavesdropping." (See Affidavit of Probable Cause for War-

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[4] Use of the conditional guilty plea was condoned in *United States* v. *Zudick*, 523 F.2d 848 (3d Cir. 1975).

rant #36688 for "conversations between Special Agent Steven Hopson and Hazel Morrison," at A. 13a-14a).

When agent Hopson took the stand, he had difficulty recalling what transpired between him and the Respondent at her home. He was generally unsure, if he was not "mistaken" in his recollection (A. 35a). For example, in the first twenty-one pages of his testimony, he could not recall or equivocated his answers as to over ten questions. Agent Hopson took the stand and testified, *inter alia:*

> Q [By Mr. McCarthy] Did you ask her anything about her case?
>
> A Definitely not [A. 26a].
>
> * * *
>
> Q Did you say anything about that case?
>
> A Not that I recall. . . .
>
> Q Did she discuss with you anything about her case?
>
> A No sir [A. 28a].
>
> * * *
>
> Q In that telephone conversation on August 23 in the late afternoon, did you discuss her case with her at that time?
>
> A Not that I recall [A. 30a].
>
> * * *

But later, the agent would "recall" and contradict his previous testimony:

> Q Did you at any time during these three contacts with Mrs. Morrison discuss with her anything about this case?
>
> A No sir, not specifically [A. 31a].

The agent admitted that he was attempting to acquire an "off-the-record offer" of what she could do (A. 32a) without the knowledge of her attorney. However:

> Q In that telephone conversation on August 23 in the late afternoon, did you discuss her case with her at that time?
>
> MR. CUCINOTTA: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: Not that I recall [*Id.*].

Believing his conversations with the Respondent were recorded, during cross-examination Hopson testified that the original Assistant United States Attorney assigned, Mr. Riley, "may have" spoken to him on several occasions regarding Hazel Morrison (A. 34a), but that he could not "recall exactly" (*Id.*). He said he did not need any additional information to assist his investigation from Agent Dennis Malloy; that he was aware of the charges against her before going to see her (A. 39a); and that he wanted to "help her" with respect to those charges (A. 41a). However, agent Hopson was otherwise

"unsure" or "vague" in his recollection. For example:

> Q [S. Hopson — cross] What did you say about the Marshal Protection Program to Hazel Morrison?
>
> A I really don't recall. . . .
>
> Q Did you have an opportunity to explain to her her present predicament in terms of coming to trial?
>
> A I really don't understand your question [A. 42a].

To assist the agent's faulty memory, a transcript was handed to the prosecutor. The prosecutor asked for a side bar and stated:

> Mr. Cucinotta has just handed me a transcript which I believe purports to be a transcript of a telephone conversation which was apparently recorded by the defendant.
>
> That being the case, it is my understanding that the defense is going to try to attempt to impeach this witness.
>
> Any recording made in the State of Pennsylvania by a private individual is a violation of state law, Section 5702, if made over a telephone wire, and Section 5706, if made in, say, for instance, a person's home.
>
> It is the Government's intention to request the Court that the tapes that are on Mr. Cucinotta's counsel table and the recording device be retained by the court for possible use in a state prosecution.
>
> The particular section here, Subsection (c)(1), [A. 46a], states that no use shall be made of any recording pursuant to this subsection including, but not

limited to, direct or indirect use in any court or administrative proceeding.

Whoever made that recording faces a possible two-to-three year jail term under the Pennsylvania code.

As well, Your Honor, the decision of the United States versus Starks requires that before any recording be offered into evidence that a foundation be laid.

No foundation has been laid for this recording.

MR. CUCINOTTA: Your Honor, my sole attempt at this point is to see if this transcription will refresh the memory of the agent so that he may more accurately describe the phone conversation that he had with Hazel Morrison on that particular day, number one.

Number two, Your Honor, this information is not illegal. It is not a violation of state law; nor is it a violation of federal law. It is a violation of neither federal nor state law at this point only because, specifically, this is merely a transcription of one —

Your Honor, *the witness is overhearing the conversation. I would ask that he be able to sit down.*

THE COURT: No; he can not hear you. I can barely hear you myself. Go ahead. [Emphasis Supplied, A. 47a].

Although the trial court stated the witness could not hear the conversation, a subsequent search warrant for defense counsel's files, briefcase, (A. 77a), tapes and tape recorder averred that the agent reported that

defense counsel became nervous when quested at side bar.[5]

Defense counsel renewed his argument for permission to use G-2 to refresh the agent's memory:

> MR. CUCINOTTA: It is that one side-Your Honor-[A. 47a] or, it is only the recording of — it is a transcription of only the defendant's voice. It has nothing to do with what — there was no wire interception whatsoever.

---

[5] *AFFIDAVIT OF PROBABLE CAUSE FOR WARRANT #36688*

On September 5, 1978, information was received from S/A Stephen Hopson, DEA, that he believes that tape recordings that resulted from illegal wiretapping and eavesdropping were possessed by Salvatore J. Cucinotta, Esquire, and turned over to the U.S. District Court on 9/5/78.

S/A Hopson stated that on 9/5/78, he observed two audio cassette tapes on the defense table in *U.S.* v. *Hazel Morrison*, CR 78-193, in which Mr. Cucinotta was defense counsel. The marking on these tapes included the S/A's name and some dates. He immediately brought this to the attention of Assistant U.S. Attorney Daniel McCarthy, the prosecutor in the case.

A short time later, Assistant U.S. Attorney McCarthy asked Cucinotta what the tapes. Cucinotta replied that he had all of S/A Hopson's conversations with Hazel Morrison on tape. McCarthy advised Cucinotta that "if these tapes are what you say they are, then they are an illegal intercept."

Later, during the Court proceedings, Cucinotta had a transcript marked and appeared to be relying on the transcript in his questioning. At that point, Judge Hannum, who was presiding, questioned the nature of the recordings and the transcript. Cucinotta explained that they were recordings of only one side of the

THE COURT: Where did you obtain this so-called copy of a transcription?

MR. CUCINOTTA: Your Honor, I was — I was present when the call was made. It is exactly what she said on the phone and that is all.

MR. McCARTHY: So that a recording was made; is that correct?

MR. CUCINOTTA: Yes, but it is not — it is not illegal.

THE COURT: The statute here sayd it is.

MR. CUCINOTTA: Nothing was intercepted.

MR. McCARTHY: Your Honor, I have the statute for the Court. I would like to read it.

---

conversation, that of his client, S/A Hopson reported that Cucinotta became visibly nervous and evasive at the questioning of Judge Hannum. Later, Cucinotta told McCarthy and Hopson that it was better for his client to take a two year state sentence (for eavesdropping) than a 15 year federal sentence (for narcotics).

Thereafter, Judge Hannum's Courtroom Deputy Mattie Hooker, received custody of the transcript and cassette recordings as well as the cassette recorder.

The conversations between Hopson and Hazel Morrison included both telephonic and in person conversations. S/A Hopson did not consent to any interception or recording of his conversations nor did he consent to divulging same.

The pertinent facts stated above have been verified by Assistant U.S. Attorney Daniel McCarthy.

Your affiant believes that the information contained herein is reliable and makes out probable cause for this warrant for evidence of Breach of Privacy under 18 C.P.S.A. §5702 and 5704.

(A. 13a-14a).

MR. CUCINOTTA: It is a state statute.

THE COURT: Well, I am aware of it.

MR. CUCINOTTA: It is only one, Your Honor. It is only one side of a conversation. It doesn't even contain his conversation.

It is as if I wrote down the words on a pad as you said them over the phone and that is all.

MR. McCARTHY: If I may read the pertinent portion of the statute: [A. 48a]. . . .

MR. CUCINOTTA: There is no interception here. I am sorry; excuse me. . . .

MR. McCARTHY: You have intercepted. You have recorded that conversation.

MR. CUCINOTTA: No; I did not.

MR. McCARTHY: The law specifically covers that.

MR. CUCINOTTA: No; I did not.

THE COURT: Please let him finish.

MR. CUCINOTTA: Yes, sir. . . . [A. 49a].

THE COURT: We are at a posture now where there is a conversation, I assume, that Mr. Cucinotta is going to ask about on cross-examination; and is it your intention to utilize this sheet, which is G-2, to question this witness about something he presumably said to Mrs. Morrison over the telephone? Is that your intention?

MR. CUCINOTTA: Yes, Your Honor. My intention is to see if this here would refresh his recollection.

THE COURT: In order to do that it will be without reaching the point as to the validity of this.

We would first require a validation of the transcript.

Who made this?

MR. CUCINOTTA: I am not introducing it into evidence. . . .

THE COURT: Who made it? . . .

THE COURT: Who typed this up?

MR. CUCINOTTA: Your Honor, if the Court please, I am not prepared at this point to tell you. [A. 50a].

THE COURT: I asked you who typed it up.

MR. CUCINOTTA: I don't know. I was given that by one of my — by an investigator.

THE COURT: Well, how did you get hold of it?

MR. CUCINOTTA: Your Honor —

THE COURT: I asked you who typed it up.

MR. CUCINOTTA: All right. Your Honor, I am not — I am not prepared to answer that question. All I am telling you —

THE COURT: Well, if that is your answer, we will proceed. You are saying you are not prepared to tell me who typed it up.

MR. CUCINOTTA: I don't even know who typed it up, Your Honor.

THE COURT: You may be seated. Proceed.

MR. CUCINOTTA: May I — may I question the witness with that?

THE COURT: I asked you a question as an officer of the court.

MR. CUCINOTTA: As an officer of the court, Your Honor, it was the — it was the secretary of my investigator who typed [A. 51a] it up.

THE COURT: Whose name is what?

MR. CUCINOTTA: I don't know.

THE COURT: All right. We will proceed.

You ask your question, and if there is any objection, we will rule on it.

This is your sheet.

MR. CUCINOTTA: Thank you.

(End at side bar).

THE COURT: Ask your question, please.

MR. CUCINOTTA: Yes, Your Honor.

BY MR. CUCINOTTA:

Q Mr. Hopson, do you recall when Hazel Morrison called you on the phone she said, "I am calling you back because I was thinking . . ."?

THE COURT: You are reading from something?

MR. CUCINOTTA: It is a question, Your Honor.

THE COURT: I say: You are reading from something?

MR. CUCINOTTA: Yes, Your Honor.

THE COURT: What are you reading from?

MR. CUCINOTTA: I am reading from a piece of paper which I had hoped to have — to assist in the

agent's recall so that he will be able to tell us in detail as to what he heard [A. 52a] from Hazel Morrison on that particular day.

THE COURT: All right.

The first thing will be to validate that from which you are reading.

BY MR. CUCINOTTA:

Q Mr. Hopson, tell me —

THE COURT: I say the first thing is that you will validate that from which you are reading.

MR. CUCINOTTA: Yes, Your Honor. I was going to validate it through this witness.

THE COURT: How are you going to do it?

MR. CUCINOTTA: I was going to ask him as to whether or not this is what he heard her say.

THE COURT: What is your view, Mr. McCarthy?

MR. McCARTHY: Your Honor, I object to that procedure. Counsel is attempting to rely upon a transcript of an illegal recording. . . . The Government would request that that recording [A. 53a] equipment be seized and held by the court for possible state investigation and the Government would request before any use be made of either that recording or that transcript that the defendant in this case comply with the requirements of United States versus Starks for the admissibility of the tape recording. . . . [A. 54a].

MR. CUCINOTTA: . . . I am attempting to . . . refresh this witness's memory with respect to some of the exact statements that I know that purportedly he heard over the phone.

THE COURT: You say you know. Is that your testimony?

MR. CUCINOTTA: I was present when the phone call was made.

THE COURT: Are you testifying?

MR. CUCINOTTA: No, Your Honor.

THE COURT: All right. Go ahead.

BY MR. CUCINOTTA:

Q Do you recall, Agent Hopson, whether or not —

THE COURT: Now, just a moment.

You are addressing the Court.

Have you concluded your address to the Court with respect to Mr. McCarthy's position?

Either you have or you have not.

MR. CUCINOTTA: I have not, Your Honor.

THE COURT: All right. Proceed, then. [A. 56a].

MR. CUCINOTTA: . . . Part of the evidence is tape recordings which were consensually utilized to convict her; yet in the same position she may not be able to do exactly what the agents did in this particular case; that is why she did not do what the agents did in this particular case, because for her to do it would be illegal, and that is the status of the law, and for the agent to do it, have the informant bug her phone, that is OK; so we didn't do what the agents can lawfully do, and I think that that is an ironic turn of events. . . . [A. 57a].

THE COURT: Stop making a speech and stick to the law, if you will, please.

Is that your representation to the Court?

MR. CUCINOTTA: Yes, Your Honor.

THE COURT: All right. *The objection is sustained.*

MR. CUCINOTTA: Your Honor, I would like permission to mark this piece of evidence.

THE COURT: Do it without a speech. . . . [Emphasis Supplied, A. 58a].

Hopson testified that the defendant called him to have him repeat how he could help her more than her attorney (A. 58a). Seeing her a second time, he discussed the likelihood of her winning the case (A. 64a), and that she could receive a severe sentence, if she did not cooperate (A. 62a).

The Government continued to attempt to discover what was contained on the tapes on defense counsel's desk (A. 64a) seized by the Court under protest (A. 65a) before any agents continued to testify.

MR. McCARTHY: Your Honor, I would request that the tapes and the recording equipment be left in the possession of the court.

THE COURT: All right. They may be.

MR. McCARTHY: Thank you.

THE COURT: They will be given to Miss Hooker and she will retain them.

I say they will be given to Miss Hooker and you [A. 64a] can do that right now, Mr. Cucinotta.

I say you can do that right now, Mr. Cucinotta.

Give them to Miss Hooker.

MR. CUCINOTTA: I object, Your Honor.

I do believe that this amounts to a —

THE COURT: I say give them to Miss Hooker as the Court has directed you.

MR. CUCINOTTA: We will submit them to Miss Hooker under your direction.

THE COURT: I beg your pardon?

MR. CUCINOTTA: Under your direction I am submitting them to the Court.

THE COURT: No further comment is invited [A. 65a].

After a recess, the Court directed defense counsel to obtain a lawyer for himself (A. 66a). Defense counsel advised the Court of a federal case also indicating that G-2 was *not* illegal. (*Id.*). Still, the Government warned counsel of his *Miranda* rights (A. 67a-68a), and the Assistant United States Attorney agreed that it would be necessary to listen to the tapes to determine whether or not the conversations of agents Bradley and Hopson were recorded (A. 68a). Defense counsel's opportunity to respond to the Government's position was interrupted by the trial court who admonished counsel to "stop right there" (A. 69a). Notwithstanding the Court's admonishment, defense counsel stated for the record:

> [T]here has been a confiscation, actually a seizure, of a tape recorder and two tapes that were on my desk [A. 70a]. *How the United States Attorney figures that they were relevant, I don't understand, but it was actually seized.* [Emphasis Supplied, A. 71a].

The Assistant United States Attorney then represented to the Court that he had "probable cause and a reasonable basis to believe that the contents of those tapes" violated Pennsylvania law (A. 71a), when only minutes before he believed "that there is a possible violation of state law (A. 68a). "That is inaccurate" defense counsel advised the Court (A. 71a); yet, the prosecutor continued his efforts to discover what was contained in the confiscated tapes because "Mr. Cucinotta is unwilling to tell us whether or not the agent's voice is on those tapes . . . ," despite counsel's position that what was confiscated was "irrelevant" (A. 77a).

The Court recessed and would not resume until the local prosecutor arrived with a search warrant (A. 73a-77a) because:

> THE COURT: This tape and apparatus is in the custody of Miss Hooker. It seems to me that it should so remain.
>
> What is your view on that, Mr. Cucinotta?
>
> MR. CUCINOTTA: Your Honor, I think that defendant's Sixth Amendment right to counsel is being intimidated, threatened —
>
> THE COURT: There is nobody being intimidated, counsel; we are trying to afford you proper protections and that you should understand.
>
> MR. CUCINOTTA: Your Honor — Your Honor —
>
> THE COURT: Yes.
>
> MR. CUCINOTTA: May I continue?

THE COURT: Certainly. [A. 76a].

MR. CUCINOTTA: Your Honor, defendant is telling the Court that there is evidence that the Government has infringed upon her right to counsel.

Now, in terms of what has occurred at the hearing there is another demonstrable effect by the Government in terms of affecting her right to representation where her very attorney has had items from his files taken from him.

THE COURT: Well, we have not taken them. The matter was turned over to Miss Hooker, as you know.

MR. CUCINOTTA: Over my objection, Your Honor, as an officer of the court only, Your Honor, under protest, Your Honor, and I ask that they be returned. [A. 77a].

Members of the Philadelphia District Attorney's Office arrived with a signed search warrant in hand and were ready for execution of the warrant (A. 83a). They requested permission from the Court for immediate seizure of the tapes (A. 84a), which was denied (A. 85a).

The first day of testimony ended with the request that the stipulated sequestration of Government agents remain in force; and that the Government not be given access to the confiscated tapes overnight (A. 86a).

The next day, the Government filed a "Motion for the Release of Impounded Tapes and Recording Equipment" (A. 95a). Counsel for Mr. Cucinotta again advised the Court that no violation of law had occurred (*Id.*), but the Government continued its attempt to "be permit-

ted to listen to the tapes . . . so that we would not waste the time of the Court . . ." *before* continuing testimony (A. 96a).

When it was decided that the tapes would be heard *after* the hearing, testimony on the defense Motion to Dismiss continued with the unexpected recall of agent Hopson "in the interest of justice" (A. 102a). The day before agent Hopson testified, despite recall problems, that (1) he had contact with the Assistant United States Attorney in charge before contacting the defendant; and that (2) he told her, "similar to the first meeting," (A. 30a) to contact her lawyer. Retaking the stand, however, he was asked by the prosecutor:

> BY MR. McCARTHY:
>
> Q Mr. Hopson, yesterday afternoon under questioning from Mr. Cucinotta questions were asked concerning any representation that may have been made to Hazel Morrison. (A. 103a).
>
> In regard to those questions is there anything further that you recall concerning any representation that you may have made to Miss Morrison concerning her representation by counsel?
>
> A Yes, sir.
>
> Q Can you please explain those to the Court?
>
> A During one of the meetings that I had with Mrs. Morrison I explained to her and I questioned her as to if she had retained private counsel or if she had a public defender.
>
> I recall her response being that she had retained a private counsel and I questioned her.

I said — I asked her how much money she had paid him.

I think she said in the amount of $200 and she said she didn't pay him too much.

And I suggested to her also that if she was going to cooperate with the DEA it may be advisable for her to obtain a public defender, whereas she wouldn't have to pay any money to a private counsel; and I also suggested that I would let her think about what type of representation she may acquire for the amount of $200.

Q So you then did make comments concerning the representation by her counsel.

A Yes, sir.

Q Did you make any comments specifically concerning Mr. (A. 104a) Cucinotta?

A I don't recall.

I said that I was a case agent against Mr. Cucinotta in the past.

I don't recall any further representation. I may have; I may not have. (A. 105a).

Agent Bradley took the stand and stated that both he and Hopson knew who her lawyer was "at the first meeting. . . ." (A. 118a). He recalled the use of bad language in meeting with the defendant (A. 118a), as did the Respondent and her children.

Agent Dennis Malloy testified that he met the Respondent's attorney along with the Assistant United States Attorney as early as May of 1978 (A. 121a). He

recalled how agent Hopson wanted to talk to the Respondent. "*In the normal course* of working with the DEA, [Malloy] . . . expected that Agent Hopson would negotiate with . . ." the Respondent (A. 123a); and that Hopson knew who the defendant's attorney was (A. 124a); and that when he returned from the meetings with the defendant, Hopson reported that "nothing had transpired of use to *either* of us at that time" (Emphasis Supplied, A. 123a). It should be emphasized that at the conclusion of the hearing, the state and federal prosecutors listened to the confiscated tapes and concluded that no violation of law had occurred (A. 191a), as defense counsel had at all times contended.[6]

SUMMARY OF ARGUMENT

The order of the Third Circuit Court of Appeals dismissing the indictment with prejudice is proper, necessary and just, as well as in conformity with all reported cases of similar prosecutional government misconduct. The facts set forth above are undisputed. The government intentionally, repeatedly and surreptitiously contacted the accused to induce her to abandon her defense and her counsel, and cooperate with the government through cooperative defense counsel to be chosen by the government. This process totally ignores and flaunts the historical, jurisprudential and democratic *raison d'etre* of criminal defense counsel and the adversary system, all of which will only be preserved by a dismissal of the charges.

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[6] The two tapes contained records of a Christmas party and a law school lecture (A. 193a).

ARGUMENT

A.

The Respondent submits that the charges against her must be dismissed with prejudice. No other remedy is adequate to rectify the government's disregard of our adversary system as held in *Commonwealth* v. *Manning*, 359 N.E.2d 51 (App. Ct. 1977), *rev.* 367 N.E.2d 635 (Mass. S. Ct. 1977); *People* v. *Mason*, 97 Misc.2d 706, 411 N.Y.S.2d 970 (1978). Any other result operates to her prejudice because if the charges are not dismissed, then the threats of the agents have a ring of credibility, i.e., should she have cooperated.

In *Manning, supra,* the defendant was charged with selling drugs to a DEA agent. On the eve of trial, August 22, 1974, DEA agent Marchand *merely telephoned* the defendant at work without the knowledge or permission of the defendant's attorney to " 'induce the defendant to become an informer'." *Id.*, 359 N.E.2d at 52. DEA agent Marchand also made several disparaging remarks about the defendant's counsel and the manner in which he was conducting the defense. Agent Marchand "indicated that the tactics of defense counsel would not insure the defendant being kept out of jail." *Id.*

The Appeals Court of Massachusetts reversed Manning's conviction and ordered a new trial, allowed new defense counsel to be paid for by the State, without regard to indigency. This, the Appeals Court felt, would cure what had happened.

Manning contended, as does your Respondent, that allowing for a new trial and free defense counsel would specifically permit the Government to circumvent due process and the Sixth Amendment right to counsel. For "[i]n all criminal prosecutions, the accused shall enjoy the right to have assistance of counsel for his defense." *Powell* v. *Alabama,* 287 U.S. 45, 67-68 (1932).

Noting this contention in *Manning,* Justice Brown commented:

> I believe we should consider the implementation of a prophylactic rule in which the indictment against the defendant is dismissed where there was deliberate misconduct on the part of the law enforcement officers or prosecutors which interfered with the defendant's right to the effective assistance of counsel. Such a rule would likely have a stronger inhibiting effect on future police and prosecutorial conduct of this kind. [Citation omitted].
>
> The defendant may also have available to him a civil action against the D.E.A. agents alleging interference with the attorney-client relationship. [Citations omitted].

359 N.E.2d at 56.

Parenthetically, one notes that the Third Circuit treated a civil rights claim which captures part of Justice Brown's reasoning. In *Via* v. *Cliff,* 470 F.2d 271 (3d Cir. 1972), the plaintiff alleged that his consultations with his attorney while in jail awaiting trial had been deliberately obstructed and cut short by jail officials. The Court held that if the officials' interference was

either wrongfully motivated or without adequate justification, the plaintiff had established an infringement of his constitutional rights to counsel and need not additionally prove resultant prejudice. *Id.*, 470 F.2d at 275.

When the appellate decision in *Manning* was appealed to the Massachusetts Supreme Court, the Court agreed that no prejudice need be shown. The Supreme Court addressed the "sole issue of whether a new trial was the appropriate remedy for the constitutional violations found. . . ." *Commonwealth* v. *Manning*, 367 N.E.2d 635, 637(1977). The Court concluded that the indictments should be dismissed as to both counts with prejudice.[7] "The undisputed facts of the case show

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[7] Dismissal of the indictment is not a new remedy when dealing with Sixth Amendment violations, like the right to speedy trial. In *Strunk* v. *United States*, 412 U.S. 434, 37 L.Ed.2d 56 (1973), the opinion of the Court was written by Mr. Chief Justice Burger, who noted that the denial of a speedy trial is "unlike *some* of the other guarantees of the Sixth Amendment. For example, failure to afford a public trial, an impartial jury, notice of charges or compulsory service can ordinarily be cured by providing those guaranteed rights in a new trial." (Emphasis Supplied). There are other Sixth Amendment rights and due process rights like the right to a speedy trial and the right to counsel where the Court is used to deny same, where dismissal is the only remedy. To argue that dismissal should not be afforded because a "defendant who may be guilty of a serious crime will go free, without having been tried," *Strunk*, 37 L.Ed. at 61, quoting *Barker* v. *Wingo*, 407 U.S. 514, 522, 33 L.Ed.2d 101 (1972), is not novel especially when the public's interest in the integrity of the adversary system calls for dismissal. "[S]uch severe remedies are not unique in the application of constitutional standards." *Id.*

interference with Manning's constitutional right to counsel by two federal officers who worked closely with the state prosecutor." *Id.* Continuing, the Court said:

> As a general rule, "any violation of a constitutional right gives rise to presumptive prejudice, which normally requires a reversal of the conviction, in the absence of an affirmative showing by the Commonwealth that the error was harmless." [Citations omitted]. In the case now before us, we need not invoke a presumption of prejudice, as implicit in the motion judge's finding that there had been no "serious" impairment of the attorney-client relationship is a finding that the defendant had in fact been prejudiced to some extent. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser* v. *United States,* 315 U.S. 60, 76, 62 S. Ct. 457, 467, 86 L.Ed.2d 680 (1942). [Citations omitted]. *We think the application of the harmless error rule singularly inapposite here.*
>
> Further, we are of the opinion that the facts of the case demand that the indictment against the defendant be dismissed. We are confronted in this case not with the proverbial constable's blunder or even with good faith overzealousness in the pursuit of legitimate law enforcement aims. Rather, we have here a deliberate and intentional attack by government agents on the relationship between Manning and his counsel in a calculated attempt to coerce the defendant into abandoning his defense. While a balancing test may be appropriate in determining the proper scope of judicially created exclusionary rules, see, e.g., *United States* v. *Janis,* 428 U.S. 433,

454, 96 S. Ct. 3021, 49 L.Ed.2d 1046 (1976); *United States* v. *Calandra,* 414 U.S. 338, 94 S. Ct. 613, 38 L.Ed.2d 561 (1974), we do not think it the proper cause in the circumstances of this case. [Footnotes omitted].

This focus must be rather on the remedy necessary to cure the impairment. . . . [367 N.E.2d at 637] [T]he officers' misconduct was so pervasive as to preclude any confident assumption that proceedings at a new trial would be free of the taint.

Further, another trial, even if Manning is provided with counsel at public expense, may subject him to an *inexcusable risk of a more severe sentence were he reconvicted.* We think the grant of a new trial is of dubious, if any benefit to the defendant. *We also think that a stronger deterrent against the type of conduct demonstrated here is necessary.*

Prophylactic considerations assume paramount importance in fashioning a remedy for deliberate and intentional violations of constitutional rights. Such deliberate undermining of constitutional rights must not be countenanced. The specific misconduct present in this case is particularly troublesome because only when the importunings of government agents are unsuccessful will the matter come to the attention of the courts, and there is, in turn a grave danger that the courts themselves may become the instrumentality through which the government agents may effectuate threats to defendants regarding the consequences of asserting constitutional rights. [Emphasis Supplied, 367 N.E.2d at 638.].

In the case before the Court, there was clearly investigatory misconduct which was the subject and basis

of the Motion to Dismiss. Yet, the prosecution, without an adequate basis, sought to prevent its full disclosure by urging the Court to proceed harshly against defense counsel. The government initiated action and seized irrelevant tapes in the possession of defense counsel. Defense counsel was threatened by the Court with contempt and disciplinary action. This new, preventive and affirmative action of the prosecutor compounded the previous misconduct, depriving the defendant of her right to effective counsel of her choice. This fundamental violation of the defendant's Sixth Amendment right was sufficient to support and require the relief granted.

> THE COURT: . . . Mr. Cucinotta had put the Court on. In my view, this relates what did happen here.
>
> In putting the Court on, this was a matter that was frivolous, a sham, took up the time of a great many busy people, and I do not know what appropriate measure will suggest itself to the Court.
>
> It may be something in the nature of a contempt or a referral of this matter to the appropriate disciplinary board of the Third Circuit or the Philadelphia Bar Association. [A. 200a].

The government's action was clearly "a deliberate attempt to destroy the attorney-client relationship and to subvert the defendant's right to effective assistance of counsel and a fair trial," as found and stated by Circuit Judge James Hunter, III, of the Third Circuit in his opinion in this case which necessitated the dismissal of the indictment.

This was in accordance with the rationale in *Manning*:

> It may be that the only way to prevent such offensive and deliberate manipulation of criminal defendants is to formulate a per se rule which would mandate the dismissal of an indictment in cases in which government agents intentionally attempt to subvert the attorney-client relationship and the defendant's right to a fair trial. . . . [367 N.E. 2d as 639].

In *People* v. *Moore*, 129 Cal. Rptr. 279, 57 Cal. App. 3d 437 (1976), after the defendant was arrested and unbeknownst to the defense counsel, "[A] beautiful investigator of the district attorney's investigation unit, Ms. Casey," contacted the defendant and told him that his attorney was inadequate; he began to cooperate. 129 Cal. Rptr. 279, 281. The *Moore* case cites a series of subsequent activities which could have occurred in *Manning* and in *Morrison* if the importunings of the DEA were successful. The Court wrote:

> The People claim Moore was not denied aid of counsel at a critical stage of criminal proceedings because no plea bargain was achieved, and their use of Moore was for purposes unrelated to his own case. The People overlook the offers and assurances the district attorney's office gave Moore as to his own case.
>
> [T]he meager benefits Moore received from his unaided bargaining, underscore the prejudicial effect of acting without counsel. . . . [129 Cal. Rptr. at 281].

At oral argument the People likened their intrusion into Moore's relationship with his attorney to a violation of the rights announced in *Miranda* v. *Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694. They argue Moore's remedy is to exclude from his trial any evidence gained by their acts in that regard.

This is not a case where the People have merely failed to advise a defendant of his rights to counsel and have gained evidence from one who has not knowingly waived his right to counsel. What results from a violation of Miranda rights is tainted evidence, and the exclusionary rule is adequate to cope with the violation.

Here the People actively interfered with an attorney-client relationship established to defend Moore against the charges for which he had been jailed. Resort to a rule of evidence cannot reasonably remedy violations of Moore's right to counsel which go to the very conduct of his defense. It is not evidence which has been tainted, rather, it is Moore's right to due process.

Due process is not a yardstick of definite value, but rather is an embodiment of the traditional notions of fair play and justice. (*Rochin* v. *People of California*, 342 U. S. 165, 72 S. Ct. 205, 96 L.Ed. 183). It is clearly violated when a defendant is denied counsel in criminal proceedings, (*People* v. *Mora*, 120 Cal. App.2d 896, 900, 262 P2d 594; *Gideon* v. *Wainright*, 372 U. S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799), but may also be denied under circumstances which do not include an outright refusal to provide counsel. [129 Cal. Rptr. at 282.]

The charges remained dismissed and the judgment of the trial court was affirmed.

In *People* v. *Mason*, 97 Misc.2d 706, 411 N.Y.S.2d 970 (Sup. Ct. 1978), the defendant was told to cooperate with the DEA. Defense counsel even complained to the Court, but the DEA persisted and indicated that the defendant's attorney was "young, inexperienced and clearly no match for" the prosecutor, 411 N.Y.S.2d at 973; the defendant subsequently became an informant based on promises of probation which the sentencing law disallowed. The charges were dismissed because of the violation of the Sixth Amendment.[8]

In sum, the reported cases that are on *all fours* with the case at bar resulted in a dismissal of the charges without a showing of prejudice. No prejudice need be shown because of the magnitude of the infringement of the right of counsel in this case. The Government intruded on this right without a waiver by Respondent. Regardless of whether or not the intrusions "were wholly unrelated to the criminal charges pending," *Moore, supra*, 129 Cal. Rptr. at 282, a waiver of counsel must

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[8] "If the Sixth Amendment right to the effective assistance of counsel means anything, it certainly means that it is the actual choice of the defendant which deserves consideration." *United States* v. *Seale*, 461 F.2d 345, 358 (7th Cir. 1972); accord, *United States* v. *Wisniewski*, 478 F.2d 274, 285 (2nd Cir. 1973), quoting *United States* v. *Sheiner*, 410 F.2d 337, 342 (2nd Cir.), 396 U.S. 825, 90 S. Ct. 68 (1969). See also, *Faretta* v. *California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1972) ("unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction." 422 U.S. at 821).

be "an intentional relinquishment of a known right," *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1939), and must be made "completely and intelligently," *Id.* at 468. Thus, in *Gallarelli* v. *United States*, 441 F.2d 1402 (3d Cir. 1971), the defendant's right to counsel was infringed at sentencing and the sentence was vacated. No prejudice need be shown. *See, e.g., United States ex rel Wagner* v. *Myers*, 234 F. Supp. 239 (E. D. Pa. 1964); *see also, Hamilton* v. *Alabama*, 368 U. S. 52, 157 (1961); *White* v. *Maryland*, 373 U. S. 59 (1963); and *Strunk* v. *United States, supra*, note 6.

B.

The opinion of the Third Circuit Court of Appeals is in conformity with the law as exemplified in the decisions of cases involving similar but less egregious conduct.

In cases that do not involve wrongfully motivated attempts to subvert an accused's confidence in defense counsel, *e.g., Manning*; *supra, Mason, supra*; *Moore, supra*; nor intentional attempts to curtail attorney-client communications, *e.g., Via* v. *Cliff, supra*; but involve an undercover agent's discovery of attorney-client communications the decision of the Third Ciruit at bar finds additional support.

In *Weatherford* v. *Bursey*, 429 U. S. 545 (1977), Weatherford was an undercover agent who, with Bursey, was charged with vandalism. Both were arrested and at the invitation of Bursey, participated in pretrial defense discussions. None of the information gleaned by

Weatherford was transmitted to the prosecutor. After conviction, Bursey filed suit under 42 U.S.C. §1983 against the agent and his superior for denial of his Sixth Amendment right to counsel. The question for the Court was whether a denial occurred. This Court found none, because no information was communicated to the prosecution. 429 U. S. at 556. Had communication occurred, a conviction can be dismissed. *E.g., United States* v. *Levy*, 577 F.2d 200 (3d Cir. 1978); *United States* v. *Peters*, 468 F. Supp. 364 (S.D. Fla 1979); *Mastrain* v. *McManus*, 554 F.2d 813, 821 (8th Cir. 1977); *United States* v. *Orman*, 417 F. Supp. 1126 (D. Colo. 1976) (involving DEA interception of attorney-client communications.)

In *Weatherford*, dissenting Justices Marshall and Brennan believed the record supported a denial of the Sixth Amendment and a cuase of action under §1983. The language they used is, however, enlightening because the record now before the Court is even more egregious:

> [Even] . . . what occurred here [was] "the obvious thing in its mildest and least repulsive form . . . illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure." *Boyd* v. *United States*, 116 U. S. 616, 635, 29 L.Ed. 746, 6 S. Ct. 524 (1886). I cannot join in providing even the narrowest of openings to the practice of spying upon attorney-client communications. There are actually two independent constitutional values that are jeopardized by governmental intrusions into private communications bet-

> ween defendants and their lawyers. First, the *integrity of the adversary system and the fairness of trials is undermined.* . . . [Emphasis Supplied].

Weatherford v. *Bursey*, 429 U. S. 545, 562 (1977).

In an earlier case, also involving attorney-client communication discovery, the Second Circuit Court of Appeals wrote:

> When conduct of a Government agent touches upon a relationship between a criminal defendant and his attorney, such conduct exposes the Government to the risk of a fatal intrusion and must be accordingly carefully scrutinized. . . . The *per se* rule represents a moral as well as a legal condemnation of such egregious and unequivocal conduct for which sanctions are imposed against the Government as punishment regardless of the defendant's guilt. . . .
>
> [I]f circumstances warranted it we would shrink from such a result. *United States* v. *Rosner*, [485 F.2d 1213, 1288 (2d Cir. 1973)].

United States v. *Gardner*, 518 F.2d 633, 623 (2d Cir. 1975).

United States v. *Acosta*, 526 F.2d 670 (5th Cir. 1976), *cert. den.* 426 U. S. 920 (1976), did not involve a surruptitious and conscious effort to subvert and destroy the right to counsel and the adversary system; however, the language supports the decision of the Third Circuit in *Morrison*. In *Acosta*, the prosecution and the testifying informant managed, to, *inter alia*, cover-up the deal the informant had with the prosecutor and the informant's criminal record until defense cross-examination.

The trial court dismissed the charges after the conviction because of "outrageous" conduct of the DEA. The Circuit Court reversed the trial court because the suppression by the prosecution had no "impact on the verdict" since all was brought out by adept defense counsel. The unchecked behavior of the DEA in the instant case, however, has deeper and more incidious impact on all verdicts. Indeed, the Third Circuit opinion herein recognized that attempts to disparage defense counsel creates the danger of courts becoming "the unwitting instrumentability through which Government agents may interfere with basic constitutional rights." *United States* v. *Morrison*, 602 F.2d at 533. Curiously, the DEA in *Acosta* requested that the Fifth Circuit determine that the judiciary has no power to dismiss an indictment, but the wisdom of the Fifth Circuit is captured in their answer:

> [W]e need not indulge in dictim as to whether the law empowers a District Judge to dismiss an indictment . . . on account of prosecutorial misconduct. We decline the Government's invitation to do so and leave the point for the day when, and if, it arises. . . . 526 F.2d at 675.

See, *United States* v. *Weiss*, 599 F.2d 730 (5th Cir. 1979) (where agents met with defendant on matters not regarding his pending charges, an equivocation attempted in the case before the Court, but Weiss' counsel was not disparaged.)

United States v. *Glover*, 596 F.2d 857 (9th Cir. 1979), also supports the Third Circuit's *Morrison* opi-

nion. In *Glover*, the FBI held conversations with the defendant without the consent of the defendant's attorney.

> The facts here are clearly distinguishable from those in *Manning*. The most damaging interference with the attorney-client relationship there was the impression the DEA agents attempted to convey that defendant's counsel was incompetent. The effects of disparaging comments about counsel, particularly where coupled with a warning that reliance on counsel's judgment will not keep the defendant out of jail, can be detrimental to the attorney-client relationship and are easily expelled. [*Id.*, 596 F.2d at 861].

Repeatedly, the DEA rises to the occasion to intimidate, chill and destroy the constitutional rights of our citizens. How is it that their name appears again and again? One can wonder how lengthy the "citations" would be if the DEA's initials could be Sheapardized as in a computer search![8]

In *United States* v. *Owen*, 580 F.2d 365 (9th Cir. 1978), after conviction but before sentencing, the DEA agents approached the defendant who was represented by two lawyers, one of whom gave his consent to the agents to interview the client. The purpose of the visit was to have the defendant cooperate in an investigation of one of his lawyers. Denying the defendant's request

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[8] DEA was correllated with "outrageous, misconduct, shocking, egregious, and perjury" on WESTLAW on 10/22/80 in the Federal Supplement data bank. Forty-seven citations were printed out. There are nine data banks.

for a dismissal of charges, the Circuit Court stated that the judiciary has the power to dismiss indictments to discourage future Governmental impropriety and quoted this Court's decision in *United States* v. *Russell*, 411 U. S. 423, 431-32 (1973) that "we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." This language is prophetic, as it fits the current record.

Clearly, had the Fifth or Ninth Circuits reviewed the record in *Morrison*, the decision would be the same. This is because it is the correct interpretation of the importance of the right to counsel and the adversary system.

Furthermore, the Second Circuit appears to support the Third Circuit's opinion in Morrison. In *United States* v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973), a co-defendant was an informer and the defendant requested a dismissal without the showing of prejudice. Although the case deals with interception of attorney-client communications, the language relates to the more serious attempts not only to intercept, but also to decimate the attorney-client relationship, stating:

> A *per se* rule must . . . be thought of in terms of sanction against the Government rather than as a search for truth. Illegal wiretapping may be so far beyond the bounds of Governmental propriety that it is offensive to a rule of liberty under law. (*Katz* v. *United States*, 389 U. S. 347, 88 S. Ct. 507, 19

> L.Ed.2d 576 (1967). The use of a dummy defendant, the ultimate in the chicanery of unlawful intrusion, is cut from the same cloth. [Citations omitted]. The intrusion by a paid informer for the avowed purpose of listening to defense secrets is not different. . . .
>
> In all such cases the Government has been treated as ruthless beyond justification. It has stooped to conduct well below the line of acceptability. These strictures, while legal principles in constitutional terms, are also moral judgments. They assess the guilt not of the defendant but of the Government. The Supreme Court in the Hoffa case considered *Coplon*, *supra*, and *Caldwell*, *supra*, so strongly urged upon us by appellant, as cases which "dealt with government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel." *Hoffa* v. *United States, supra,* 385 U. S. at 306, 87 S.Ct. at 416. When the Government is found guilty of such a charge, the dereliction is more than the bungling of the constable, in Judge-Cardozo's phrase. *People* v. *Defore*, 242 N.Y. 13, 150 N.E. 585 (1926). *It is a corrupting practice which may justify freeing one guilty person to vindicate the rule of law for all others.* See Mr. Justice Holmes dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 469 S.Ct. 564, 72 L.Ed. 944 (1928). [Emphasis Supplied, *United States* v. *Rosner*, 485 F.2d at 1227].

Indeed, inherent prejudice can be found upon consideration of the fact that by not accepting the overtures of the agents, the Respondent, for example: (a) did not receive the benefit of leniency which was covertly pro-

mised to her by the agents; (b) the possibility of a lenient recommendation by the United States Attorney at her sentencing was lost as promised by the agents in their threats; (c) after the agents conduct was completed, all future decisions of her and her counsel become tainted in that she will never know whether she would have received a lessor sentence had she cooperated; (d) the conduct prejudiced the strength of her counsel's ability to maintain his office and execute his duties as the Respondent's chosen attorney; and finally (e) the agents' threats and disparagements irreparably tainted and beclouded the Respondent's right to rely on unencumbered and trustworthy advice from her counsel to an incalculable degree.

C.

The Third Circuit's rule remedies the ongoing Governmental misbehavior in the case in chief and in other reported and unreported cases.

There is a line of reasoning in factual circumstances involving interception of attorney-client communications that dismissal would be appropriate if the activity is considered "widespread." *E.g., Weatherford* v. *Bursey, supra; cf., United States* v. *Broward*, 594 F.2d 345, 351 (2d Cir. 1979), cert. denied, _____ U.S. _____ (1979). Keeping in mind that the aforesaid cases do not involve an attempt to decimate the attorney-client relationship, the mere existence of the cases demonstrates widespread activity.

Second, the Government's Petition for Certiorari in the case before the Court implicitly admits the existence of other unreported cases. "[T]he Court of Appeals' ruling can be expected to produce significant delay in a substantial number of future criminal cases," Government's Petition, p. 10; and, "may perceptibly increase the already heavy burden on the federal criminal process by giving rise to a large number of motions. . . . "*Id.*, p. 22. This is the same reason offered by the Government against the relief granted in *Miranda* v. *Arizona, supra*. Furthermore, the granting of relief without a showing of prejudice as referred to in *Rosner, supra*, is not novel. See *Strunk* v. *United States*, 412 U.S. 434 (1973); *Barber* v. *Municipal Court*, 157 Cal. Rptr. 664 (1979).

United States Attorney Peter Vaira's letter also reveals a pattern of conduct in that the conduct has its own administrative regulations. According to Mr. Vaira, (A. 217a to 219a), a letter was sent to all federal agencies warning that before "contact" is made with a defendant, permission must be given according to their guidelines from the U.S. Attorney. No mention is made concerning the limits on such contact, so agents could still repeat what occurred in *Morrison*.

Fourth, in the Appendix attached to the Brief for the United States in *Morrison* a letter from Charles B. Renfrew, Deputy Attorney General, shows that the insidious undermining of the counsel rights of the accused is pervasive and widespread. The letter is in response to *United States* v. *Glover*, 596 F.2d 857, cert. denied, 444

U.S. 860, where FBI agents merely interrogated an accused without permission of counsel. No disparagement occurred, nor were any attempts made to undermine the accused's ability to present evidence in a court of law without fear of re-arrest, nor was the judge slandered, nor did it take place in the accused's home, as in *Morrison*. The interesting point the letter shows is the averment that what occurred on November 2, 1977, to Robert Glover was *also* "most unusual and do not typify the kinds of contacts between agents and represented defendants. . . ." Remember what Mr. Vaira wrote regarding *Morrison*: "I am confident that the improper conduct was an isolated incident." Was it isolated because the attempt to decimate the attorney-client relationship strolled into the courthouse itself? Because what occurred to *Morrison* was indeed different in quality and quantity to *Glover, supra*.

The Renfrew letter goes on in the same manner as Vaira's letter. He recognizes that interviews with people accused of violations of the law are necessary to prosecute offenses against the United States. This is accurate. Interviews are necessary, interrogations and inquisitions are too.

He reveals further that:

> [W]e believe that government lawyers and agents should avoid any discussion relating to pending charges with a represented defendant unless they have received the consent of his attorney. We believe this policy is important in order to promote the effectiveness of the attorney-client relationship

> between a defendant and his counsel. Prosecutors and agents have been, and will continue to be, sensitized to this general principle. [Brief for the United States, p.2a, *United States* v. *Morrison*, No. 79-395]

Thus, the prosecutor is the protector of the attorney-client relationship; and, as all protectors, they are above it, and can create exceptions to the policy of promoting effectiveness of defense counsel. The letter, expectedly, then indicates the exceptions to effective defense counsel.

> [T]here may be circumstances where the government is seeking information critical to the safety of life or limb-for example, the location of a kidnapping victim-from a represented defendant and there is substantial reason to believe that the presence of counsel will delay or impede the flow of the needed information. This should be a rare case and should be undertaken only when those in *supervisory positions are convinced there are no feasible alternatives.* [Emphasis Supplied, Brief for the United States, p. 4a]

The Court ought to remind the Government who the supervisors are as soon as possible!

CONCLUSIQN

The opinion of the Third Circuit is correct. It is consistent with all known reported cases. The issue presented to this Most Honorable Court must focus primarily on the adversary system and secondarily on the position of the Respondent after the intrusion. *Weatherford, supra* 429 U.S. at 562. Dismissal is the only

remedy otherwise the Government's behavior is sanctioned.

A reversal of the Third Circuit's decision will sanction the behavior of the DEA in this case. All Government agencies will then be allowed to seek to dismiss those defense attorneys who do not assist the Government's investigators of criminal conduct. If the importunings of the agents are successful, defense counsel becomes an agent of the Government, instead of the defendant. It opens a pandora's box recognized in this Court's language when attempts are made to make "nice calculations" as to the effect on the attorney-client relationship. *Glasser* v. *United States*, 315 U.S. 60, 76 (1942). Conceivably, the defense attorney selected by the Government may be an unwitting instrumentality of the DEA. One can imagine DEA agents referring defendants to inexperienced or easily intimidated counsellors for their own purposes. It could also legitimize the spector of corrupted defense attorneys working directly with the DEA. *Cf., Messelt* v. *Alabama*, 595 F.2d 247 (5th Cir. 1979) (defense counsel asks prosecutor to increase charges against defendant so he could collect his fee).

To sanction or allow the Government to subvert a citizen's confidence in counsel of her choice, also places the entire judicial system in the hands of the DEA. Indeed, the Courts themselves become an unwitting instrumentability in the corruption of the judicial system. This corruption is clearly exemplified in this case. The record throughly demonstrates that the Government lied to the Court about the involvement of their agents in the

attempt to disparage the competence of defense counsel, and sought to convince the trial court that the effectiveness of counsel was not discussed. The only reason the Government was unable to hide and cover-up the magnitude of the agents' dispicable acts was due to their fear of discovery and perjury charges when they thought their conversations with the Respondent were on tape.

The prosecutor was motivated to continue the ruse. The record reveals a calculated and concerted effort to determine what was contained on the tapes by utilization of search warrants, contempt citations, threats of arrest and loss of defense counsel's license to practice (A. 193a). The purpose of this action was to avoid full disclosure of misconduct. The prosecutor enticed and enlisted the court in these endeavors. The investigatorial and prosecutorial misconduct was deliberate, wrongly motivated and unjustified in this case. It clearly interfered with the attorney-client relationship and constituted a violation of the defendant's Sixth Amendment right to effective assistance of counsel. The appropriate and only effective remedy was to dismiss the indictment. The Circuit Court so decided. It did not commit reversable error in so doing.

The decision of the Third Circuit Court of Appeals in this matter should be affirmed.

Respectfully submitted.

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